In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1495

ANTHONY JOSEPH CIMINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* order of the court of appeals, (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1970. A petition for rehearing was denied on March 27, 1970. The petition for a writ of certiorari was filed on April 27, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's absence from a hearing in chambers at which court and counsel fully explored with a juror whether her recollection that she had previously seen petitioner would affect her ability to render a fair verdict (her considered judgment being that it would not) constituted plain error.

2. Whether the government established that petitioner had passed forged or falsely made checks within the reach of 18 U.S.C. 2314.

3. Whether the court's instructions were proper.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of wilfully causing forged or altered securities to be transported in interstate commerce, in violation of 18 U.S.C. 2314. He was sentenced to two years' imprisonment subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed *per curiam*, finding (as to all the issues presently advanced) that none had been preserved for appellate review by objection in the district court and that the transcript showed that there had been no plain error (Pet. App. A).[1]

The evidence revealed that on January 30, 1968, petitioner presented three checks, totalling $7,250, for

[1] Petitioner also claimed below, but does not claim here, that his representation by retained counsel was ineffective. The court of appeals properly rejected this contention.

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deposit at the City National Bank in Detroit, Michigan, where he had an account. The checks were drawn on the Chase Manhattan Bank in New York; they purported to be signed by one John S. May of 33 Tenth Avenue, New York City, on the account of United Trucking Company, and were payable to the Empire Cartage Company, a business petitioner owned. At the same time as he made this deposit, petitioner sought to cash two checks—one for $3,200 and one for $439. After the bank manager approved these transactions, the teller executed them (Tr. 16-20, 22-23, 26-27, 31-33, 53, 80).

The Chase Manhattan Bank thereafter returned the three checks accepted for deposit in Detroit. A bank investigator testified that Chase had no account number corresponding to that on the three checks, nor any record of an account at the bank in the name of John S. May or United Trucking Company (Tr. 37-39, 42-43). An F.B.I. agent testified that he went to Tenth Avenue and found that no number 33 existed. Postal officials in the area had never heard of a John S. May. The agent consulted all telephone directories for the city of New York and the credit bureau but could uncover no trace either of a John S. May or of a United Trucking Company (Tr. 47-49).

After the checks were returned to the Detroit bank, the manager contacted petitioner. He said he had obtained the checks from a man (whom he did not name) and that he would endeavor to reach this individual to clear up the matter. However, the matter was never resolved (Tr. 54-57). At the time the

three checks were deposited, the Empire Cartage Co. account contained only $28 (Tr. 69). Other evidence was introduced showing that petitioner at the time was in financial straits.

Petitioner testified at trial that he had secured the checks from John S. May, a person he knew from race tracks and other places of gaming; that he had tried to find May after the City National Bank had contacted him but was unable to locate him; and that he believed the checks were genuine at the time he deposited them.

ARGUMENT

We note at the outset that petitioner is in error in asserting that the court of appeals did not consider his claims of error. It is true that its opinion pointed out that the issues raised on appeal had not been preserved by appropriate objections at trial; nevertheless, the court went on to point out that it had "reviewed the transcript and [found] that the defendant received a fair trial devoid of plain error * * *" (Pet. App. A. 15). This conclusion, we submit, is fully justified.

1. During the trial, one of the jurors told a court officer that after observing petitioner she thought she had seen him before, notwithstanding her response on voir dire that she had never seen him. The judge then held a conference in his chambers, at which the juror and both prosecution and defense counsel (but not petitioner) were also present. On examination, the juror stated that she had seen petitioner some

three or four weeks previously in her bank, apparently as a fellow customer. She had had no other acquaintance with him and stated that this chance incident would not affect her ability to render a verdict. At the conclusion of his questioning, the judge indicated that he considered that the juror would be able to consider the case fairly. He offered defense counsel an opportunity to put any questions, but counsel declined and expressed himself satisfied with the ruling (Tr. 105-109). Petitioner contends nonetheless that there was plain error and a violation of his Sixth Amendment rights resulting from the fact that he was not present at the conference. Even assuming that the propriety of the proceeding could be raised for the first time on appeal, no prejudice ensued from his absence; he could readily have passed on to counsel any recollection he had of the event in question. See *Johnson* v. *United States*, 318 U.S. 189, 201-202; *Peterson* v. *United States*, 411 F. 2d 1074, 1080-1081 (C.A. 8), certiorari denied 396 U.S. 920; *Glouser* v. *United States*, 296 F. 2d 853 (C.A. 8), certiorari denied, 369 U.S. 825.

2. Petitioner contends that there was plain error in his conviction since, if the drawer of the checks existed (as he testified) but the account on which the checks were drawn was non-existent, the checks would not be forged or falsely made within the meaning of 18 U.S.C. 2314. The question posed need not be reached, however, since the premise on which it rests is unfounded. There was ample evidence from

which the jury could find that no such man as John S. May, the purported drawer, in fact existed.

3. Petitioner challenges the propriety of the court's instruction that, as the judge understood petitioner's position, "he does not deny that the check was forged, was issued in New York on a bank" (Tr. 169). Petitioner omits the sentences following, in which the judge pointed out that what petitioner was disputing was that he knew at the time he presented the checks that they were falsely made or forged (*ibid.*). This was an accurate statement of petitioner's position. Defense counsel, moreover, explicitly declared himself satisfied with the court's charge (Tr. 174).

4. Finally, petitioner contends that the court committed plain error in its instructions to the jury following receipt of a note inquiring whether they could recommend leniency. The trial judge, in a careful instruction, advised the jury that the matter of punishment was solely for the court and should not be considered by them in assessing guilt or innocence. The judge quoted from a specific instruction on this point which had been approved by the court of appeals. At the conclusion of the supplemental instruction, the judge asked defense counsel if he had any objection and counsel replied in the negative (Tr. 179-183). There was no error in the court's supplemental charge, much less plain error. Fed. R. Crim. P. 30.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
ROGER A. PAULEY,
Attorneys.

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